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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 568

MARGARET JEFFREY SIEBEL,

Appellant,

DEPARTMENT OF WELFARE OF THE CITY OF NEW YORK,

Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1959

No._____

MARGARET JEFFREY SIEBEL,
Appellant,
v.
DEPARTMENT OF WELFARE OF THE CITY OF NEW YORK,
Appellee.

APPEAL FROM THE COURT OF APPEALS OF THE STATE OF NEW YORK

STATEMENT AS TO JURISDICTION

The appellant, pursuant to The United States Supreme Court Rules 13 (2) and 15, files this her statement of the basis upon which it is contended that The Supreme Court of the United States has jurisdiction on a direct appeal to review the final judgment rendered in this proceeding.

Opinions Below

The Court of Appeals rendered a majority opinion written by the Honorable Chief Judge Conway reversing the order of the Appellate Division and reinstating the order of the Domestic Relations Court. A dissenting opinion was written by the Honorable Judge Fuld in which the

Honorable Judges Van Voorhis and Burke concurred, *Department of Welfare of the City of New York* v. *Siebel*, 6 N. Y. (2) 536.

The Appellate Division rendered a memorandum majority opinion, in which three judges concurred, reversing the order of the Domestic Relations Court. A memorandum dissenting opinion was also rendered, concurred in by two judges, *Department of Welfare of the City of New York* v. *Siebel*, 5 A. D. 1010.

No opinion was rendered by the Honorable Justice George Postel of the Domestic Relations Court.

Jurisdiction

The appeal herein is from the final judgment of the Court of Appeals of the State of New York.

This is a proceeding under the Domestic Relations Court Act of the City of New York to compel a stepmother, the appellant herein, to support her stepchild.

The final judgment of the Court of Appeals of the State of New York appealed from was made and entered on July 8, 1959. Notice of Appeal was filed in the Appellate Division of the Supreme Court of the State of New York in and for the Second Judicial Department on October 6, 1959.

The Supreme Court of the United States has jurisdiction to review by direct appeal the judgment complained of by virtue of the provisions of Title 28, Sections 1257 (2) and 2101 (c) of the United States Code.

The statute of the State of New York involved is Article 4 of Title III of the Domestic Relations Court Act of the City of New York, cited as added by the laws of New York 1933, Chapter 482. The particular section of that Act involved is Section 122, which provides as follows:

§ 122 Court action; summons.

"The court after receiving the petition, in cases where no agreement has been reached by the respondent and petitioner, shall in a proper case cause a summons to be issued, which shall be signed by the court or by the clerk of the court, requiring the respondent to appear at the court at a time and place named to show cause why the order for support prayed for by the petition shall not be made. Summons shall be in such form as may be prescribed by the board. A summons shall not be refused without giving the petitioner an opportunity to be heard by and present witnesses to the court."

Question Presented

Article 4 of Title III governs hearings and procedure under the Domestic Relations Court Act of the City of New York. Appellant was granted a hearing under said Act, and, as a result of said hearing, was ordered to pay for the support of her stepchild.

The question presented is:

Whether appellant has been deprived of property without due process of law.

Statement of the Case

The appellant appeals to the Supreme Court of the United States from the final judgment of the Court of Appeals of the State of New York entered in this proceeding in the office of the Clerk of the Court of Appeals of the State of New York the 8th day of July, 1959, reversing the order of the Appellate Division of the Supreme Court of the State of New York in and for the Second Judicial Department, entered the 28th day of April, 1958, and re-instating the order of the Domestic Relations Court of the City of New York, Family Court Division, County of Queens, entered the 7th day of January, 1958.

The Facts

The proceeding herein was commenced on the 5th day of December, 1957, by the filing of a Petition in the Domestic Relations Court by the Commissioner of the Department of Welfare of The City of New York. Thereafter a summons was issued by an administrative officer of that Court, directing the respondent to appear before the Court to be examined as to her ability to support her fourteen year old stepchild.

The appellant married the father of the child on August 7, 1953 (R. 53), and they reside in Little Neck, New York.

The stepchild is a delinquent, and was committed by the Court to an incorporated institution on November 1, 1957, maintained by The City of New York at a cost of $49.00 per week (R. 33).

By order of the Domestic Relations Court, the father of the child was required to pay the sum of $22.50 per week commencing January 1, 1958, for the support of the child (R. 24).

On January 7, 1958, the appellant was examined by the Court and the City of New York and an Order was that day entered requiring the respondent to pay the sum of $20.00 per month toward the support of the stepchild, retroactive to November 1, 1957 (R. 11).

The appellant appealed from said order of support of January 7, 1958 (R. 4).

The Appellate Division, Second Department, reversed said order of support on April 28, 1958, and dismissed the Petition (R. 106).

The Court of Appeals by judgment entered the 8th day of July, 1959, reversed the order of the Appellate Division and re-instated the order of the Domestic Relations Court.

From this judgment, the appellant now appeals to the Supreme Court of the United States.

The Constitutional Question Presented

The question presented is a constitutional one: the validity of Article 4, Title III of the Domestic Relations Court Act of the City of New York.

This federal question was repeatedly raised in the lower court (R. 44, 45, 46, 51, 52, 56 and 91). Appellant's counsel requested an order requiring appellant to submit to examination as to her means, so as to form a basis for an appeal. Appellant's motions were denied, and appellant was required to submit to an extensive examination by corporation counsel and the court (R. 44, 51, 52 and 65). This, despite the fact that appellant had shown cause why the order of support, prayed for by the petition, should not be made, in accordance with the explicit provisions of Section 122, of the Act, *supra*. That appellant had shown cause seems clear from the reversal of the order in the Appellate Division and from the dissenting opinion in the Court of Appeals.

The question was raised before the Appellate Division in appellant's brief, but was not passed upon in either the majority or minority opinion.

The question as to the validity of Article 4, of Title III of the Domestic Relations Court Act was also set forth in appellant's brief before the Court of Appeals and the Act was upheld as appears from the majority opinion in *Department of Welfare of City of New York* v. *Siebel*, 6 N. Y. (2) 536 at page 546, as follows:

> "Respondent argues that article 4 of title III of the Domestic Relations Court Act of the City of New York, pursuant to which this proceeding was instituted, is unconstitutional. The respondent contends that the proceeding deprives her of property without due process. She asserts that the statute does not afford one an opportunity to interpose an answer to the department's petition; that the allegations of the petition are assumed to be valid in every respect and, if they are not true, there is noth-

ing the respondent can do about it; that the city has made, not merely a prima facie case, but a conclusive case, and the sole issue becomes one of determining how much the respondent can afford to pay and that the respondent's only remedy is an appeal.

This argument is without substance. No answer or formal pleading by respondent was necessary; the allegations of the petition were to be established or disproved by evidence (Matter of Vendetti *v.* Vendetti, 16 Misc. 2d 2). The respondent was represented by counsel, and had the right to cross-examine and to present evidence. That she chose to rest upon a legal argument which the court below did not accept certainly did not deprive her of a fair hearing."

Article 4 of said Act governs the procedure and hearings, *inter alia*, under the Act.

Section 122 thereof provides for the issuance of a summons to be signed by the Court or by the Clerk of the Court requiring the respondent to appear at the Court *"to show cause why the order of support prayed for by the petition shall not be made."*

The summons issued herein, however, requires the respondent to appear before the court *"to be examined as to your ability to maintain such dependent"*, see appendix, page 25.

The respondent was granted a hearing, not on the merits of the petition, but merely as to her ability to contribute to the support of the stepchild.

The respondent showed cause, within the provisions of section 122 of the Act, why an order of support should not be entered; and yet she was required to submit immediately to a humiliating examination as to her financial means. It would appear that due process would have required an order directing an examination as to her means, so that appellant would have the opportunity to review the court's decision upon appeal. Instead, appellant was required to undergo an examination immediately, and her right of appeal could be concerned only with the order of support.

It would appear that insofar as Article 4 of Title 1II permits such a proceeding, it is repugnant to the due process provisions of Article the Fourteenth of The Constitution of the United States.

Additionally, the summons herein states that a petition has been filed by the City alleging that the respondent has "refused or neglected to provide support" for the stepchild, see appendix page 25.

As Chief Judge Conway rightly points out in the majority opinion of the Court of Appeals, *Department of Welfare of the City of New York* v. *Siebel*, 6 N. Y. (2) 536 at page 546:

> "At page 15 of her brief the respondent states that the 'Petition herein, verified December 3, 1957, filed December 5, 1957,' alleges that the respondent: 'refused or neglected to provide support for dependent child . . . for whose support you are legally chargeable.' The record contains no evidence of refusal or neglect to provide support."
>
> "An examination of the petition will disclose that the petition does not allege that the respondent 'refused or neglected: to support the child.' It alleges merely that she 'failed * * * to do so'. The contention that there was no proof of express refusal accordingly is moot. It may not be denied that prior to this proceeding the respondent had failed to provide any amount of support. Certainly that failure—and indeed even a refusal to support—may reasonably be inferred from her resistance to the making of an order in this proceeding."

One of respondent's points upon each appeal embraced the argument that the petitioner had failed to prove refusal or neglect, as:

> "The record contains no evidence of refusal or neglect to provide support. Halfway through the hearing the Court asked the respondent if she wished to contribute to the support of the child, and she refused (R. 66 and 68), but this could hardly be the refusal alleged in the Petition which was filed one month previous to the hearing."

Moot though the question may be, it is respectfully submitted that the Court's own summons should not be so phrased as to mislead the respondent. In brief, the court's process should not be substituted for due process.

Finally, it should be observed that the summons is issued "by Order of the Court" and signed by an "Administrative Officer", and yet Section 122 of the Act requires that it be signed by the Court or by the Clerk of the Court.

Conclusion

For all of the foregoing reasons, Article 4 of Title III of the Domestic Relations Court Act of the City of New York would appear to be invalid for failure to afford due process within the meaning of Article the Fourteenth of The Constitution of the United States.

We respectfully suggest that the Court may find this case an appropriate one for reversal without further argument.

The judgment of the Court of Appeals of the State of New York should be reversed.

Respectfully submitted,

ALBERT OPPIDO
Attorney of Record for Appellant

and

ROBERT V. RAFTER OF MOLLOY & FLETCHER
Attorneys for Appellant
Office & P. O. Address
22 Bayview Avenue
Manhasset, New York

STATE OF NEW YORK }
COUNTY OF NASSAU } ss.:

CHERRI DORRIS, being duly sworn deposes and says, that she is a secretary in the firm of Molloy & Fletcher the attorneys for the Appellant herein. That on the 4th day of December 1959, she served the within jurisdictional statement upon CHARLES H. TENNEY, Esq. Corporation Counsel for the City of New York by depositing a true copy of same securely enclosed in a post-paid wrapper in the Post-Office Box regularly maintained by the United States government at Manhasset in said County of Nassau directed to said CHARLES H. TENNEY, Esq. Corporation Counsel for the City of New York at Municipal Building, New York, New York, that being the address within the state designated by him for that purpose upon the preceding papers in this proceeding, or the place where he then kept an office, between which places there then was and now is a regular communication by mail.

Deponent is over the age of twenty-one years.

CHERRI DORRIS

Sworn to before me this
3rd day of December, 1959.

DOROTHY COSGROVE
Notary Public

APPENDIX

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Judgment of Court of Appeals of the State of New York, Appealed From

COURT OF APPEALS

STATE OF NEW YORK, ss.:

PLEAS In the Court of Appeals, held at Court of Appeals Hall, in the City of Albany, on the 8th day of July in the year of our Lord one thousand nine hundred and fifty-nine, before the Judges of said Court.

WITNESS,

The HON. ALBERT CONWAY,
Chief Judge, Presiding.

RAYMOND J. CANNON, Clerk.

REMITTITUR July 8, 1959.

No. 109

DEPARTMENT OF WELFARE OF THE CITY OF NEW YORK,
Appellant,
vs.
MARGARET JEFFREY SIEBEL,
Respondent.

BE IT REMEMBERED, That on the 20th day of March in the year of our Lord one thousand nine hundred and fifty-nine, Department of Welfare of the City of New York, the

appellant in this cause, came here unto the Court of Appeals, by Charles H. Tenney, its attorney—, and filed in the said Court a Notice of Appeal and return thereto from the order of the Appellate Division of the Supreme Court in and for the Second Judicial Department. And Margaret Jeffrey Siebel, the respondent—in said cause, afterwards appeared in said Court of Appeals by Molloy & Fletcher, her attorneys.

Which said Notice of Appeal and the return thereto, filed as aforesaid, are hereunto annexed.

Whereupon, The said Court of Appeals having heard this cause argued by Mr. Edward A. Doberman, of counsel for the appellant—, and by Mr. Robert V. Rafter, of counsel for the respondent—, and after due deliberation had thereon, did order and adjudge that the order of the Appellate Division of the Supreme Court appealed from herein be and the same hereby is reversed and that of the Domestic Relations Court reinstated, without costs.

And it was also further ordered, that the record aforesaid, and the proceedings in this Court, be remitted to the Appellate Division of the Supreme Court, Second Judicial Department, there to be proceeded upon according to law.

Therefore, it is considered that the said order be reversed &c., as aforesaid.

And hereupon, as well the Notice of Appeal and return thereto aforesaid as the judgment of the Court of Appeals aforesaid, by it given in the premises, are by the said Court of Appeals remitted into the Appellate Division of the Supreme Court, Second Judicial Department, before the Justices thereof, according to the form of the statute in such case made and provided, to be enforced according to

law, and which record now remains in the said Appellate Division, before the Justices thereof, &c.

(sgd.) RAYMOND J. CANNON
Clerk of the Court of Appeals
of the State of New York

COURT OF APPEALS, CLERK'S OFFICE
Albany, July 8, 1959.

I HEREBY CERTIFY, that the preceding record contains a correct transcript of the proceedings in said cause in the Court of Appeals, with the papers originally filed therein, attached thereto.

(SEAL) (sgd.) RAYMOND J. CANNON
Clerk.

Domestic Relations Court Act of the City of New York

ARTICLE 4

Procedure; Hearings; Adjudication, Et cetera

§ 121. Report presented to the court.
§ 122. Court action; summons.
§ 123. Warrants.
§ 124. Form of warrant.
§ 125. Certificates of warrants issued.
§ 126. Certificates of orders of protection issued.
§ 127. Service of summons and other process.
§ 128. Hearing.
§ 129. Procedure at hearings; rules.
§ 130. Procedure after arrest.
§ 131. Right to counsel; presumptions.
§ 132. Failure to obey order for support.
§ 133. Writ of seizure.
§ 134. Suspension of sentence; probation.
§ 135. Revocation of probation.
§ 136. Bond.
§ 137. Divorces; separations; annulments, et cetera.
§ 138. The city not a necessary party.
§ 139. Bonds for support; bail for appearance; forfeiture; payment.
§ 140. Procedure when court is not in session.
§ 141. Erroneous arraignment before a magistrate.
§ 142. Respondent in jail.
§ 143. Acceptance of undertaking by magistrates.

§ 121. Report presented to the court.—When the investigation section has taken the steps described in sections one hundred and thirteen to one hundred and eighteen, inclusive, it shall present the petition to the court with the case history and a summary of the essential facts. The court may in its

discretion receive a petition prior to the taking of such steps by the investigation section.

§ 122. **Court action; summons.**—The court after receiving the petition, in cases where no agreement has been reached by the respondent and petitioner, shall in a proper case cause a summons to be issued, which shall be signed by the court or by the clerk of the court, requiring the respondent to appear at the court at a time and place named to show cause why the order for support prayed for by the petition shall not be made. Summons shall be in such form as may be prescribed by the board. A summons shall not be refused without giving the petitioner an opportunity to be heard by and present witnesses to the court.

§ 123. **Warrants.**—When a petition is presented to the court and it shall appear

(a) that the summons cannot be served; or

(b) that the respondent has failed to obey the summons; or

(c) that the respondent is likely to leave the jurisdiction; or

(d) that in the opinion of the court a summons would be ineffectual; or

(e) that the safety of the petitioner is endangered; or

(f) That a respondent on bail or on parole has failed to appear, the court may issue a warrant, in the form prescribed in the next section, directing that the respondent be arrested and brought before the court. Warrants and other process may be served by any peace officer. The board shall make rules relative to the service of warrants. Warrants issued by the court shall be valid throughout the state.

(g) A justice of this court who in good faith issues process in any proceedings under this act shall not be liable therefor unless it is shown that his action in so doing was malicious or a deliberate abuse of his discretion.

§ 124. Form of warrant.—A warrant of arrest may be substantially in the following form, the blanks being filled in:

STATE OF NEW YORK, }
COUNTY OF ..... } ss.:

In the name of the people of the state of New York, to any peace officer in the state of New York.

A petition under oath having this day been laid before me showing that ..... is legally chargeable with the support of ..... and has failed to provide such support and praying this court to exercise its powers to compel such support.

You are, therefore, commanded forthwith to arrest the above named ..... and bring him before this court at .....

Dated at ....., the ..... day of ....., 19 .....

.....
Justice of the Domestic Relations Court
of the City of New York.

§ 125. Certificates of warrants issued.—In no case shall the petitioner be permitted to serve a warrant upon the respondent, unless the court itself shall grant such permission upon the application of the petitioner. To facilitate the arrest of the respondent, however, the clerk of the court may issue to the petitioner or to the representative of an incorporated charitable or philanthropic society having a legitimate interest in the family, a certificate setting forth that a warrant for the respondent has been issued by the court, and the presentation of such certificate by said petitioner or representative to any peace officer shall constitute authority for him to apprehend the respondent and take him to the court. Such certificates shall expire ninety days from the date of issue but may be renewed from time to time by

the clerk of the court. The clerk of the court shall keep a record of all unserved warrants and shall on the first day of each month report to the administrative officer of the part the facts relative thereto.

§ 126. Certificates of orders of protection issued.—Similarly, the clerk of the court may issue to the petitioner or the respondent as the case may be, a certificate stating that an "order of protection" has been made by the court relative to such person and setting forth its terms and requirements. The presentation by the petitioner or respondent, as the case may be, of such certificate to any peace officer shall constitute authority for him to arrest the person charged with violating the terms of such order of protection and bring such person to the court and otherwise, so far as lies within his power, to aid in securing the protection such order was intended to afford.

§ 127. Service of summons and other process.—Summons and process other than warrants may be served by a warrant officer, by the petitioner, by any person authorized by law, or through the mails. When served by mail a default order shall not be entered or a warrant issued thereon except on proof that it was received by the respondent. Personal service of summons or other process shall be made by the delivery of a true copy thereof to the persons summoned. In all cases service of summons must be made within a reasonable time before the time stated therein for such appearance, as may be provided by the rules of the board.

§ 128. Hearing.—Upon the return of the summons, the court shall proceed to hear and determine the case. The respondent shall be informed of the contents of the petition and shall be given opportunity to be heard and to present witnesses. If the court finds that the respondent is chargeable with the support of the petitioner and should be compelled to provide such support, the court shall make an order requiring such respondent to pay weekly, or at other fixed periods, a fair and reasonable sum for, or towards,

the support of the petitioner, and to observe such conditions of behavior as the court may determine. Before making the order the court shall have presented to it by the investigation section the facts discovered in its investigation of the family and may receive from other sources any information that may assist the court in its determination.

§ 129. Procedure at hearings; rules.—Hearings shall be conducted in accordance with such rules as the board may adopt. The court may adjourn the hearing from time to time for proper cause. Where the petitioner's needs are so urgent as to require it, the court may make a temporary order for support pending a final determination.

§ 130. Procedure after arrest.—When a respondent is brought before the court upon an arrest the court may proceed as upon the return of the summons as provided in sections one hundred and twenty-eight and one hundred and twenty-nine, or in its discretion may proceed to try and determine the charge of non-support. If upon such trial the court shall find by competent evidence or by a plea of guilty of the respondent that he is guilty of non-support, the court may commit him to jail for not exceeding twelve months. At any time during the trial of such charge the court may in its discretion discontinue such trial and proceed as upon the return of the summons as provided in sections one hundred twenty-eight and one hundred twenty-nine.

§ 131. Right to counsel; presumptions.—At the commencement of a hearing under the provisions of sections one hundred and twenty-eight and one hundred and twenty-nine, or of a trial under the provisions of section one hundred and thirty, the court shall inform the respondent of his right to the aid of counsel at every stage of the proceeding and before any further proceedings are had; and in the case of a trial shall also inform him of the charge against him. In any such hearing or trial wives and husbands shall be competent witnesses against each other

and may testify to non-access; a respondent shall, prima facie be presumed to have sufficient means to support his wife, child, stepchild, grandchild, parent, grandparent, and a dependent adult without means to maintain himself shall be presumed to be likely to become a public charge.

§ 132. Failure to obey order for support.—1. Where a respondent shall neglect or refuse to obey any lawful order made by the family court and the court is satisfied thereof by competent proof, it may, without notice, issue a warrant directing that the respondent be arrested and brought before the court.

2. Where a respondent employed in any department or office in the city of New York, or any borough thereof, or any county therein, or a respondent receiving a pension from any department or board of said city shall neglect or refuse to obey an order for support made under the provisions of section one hundred and twenty-eight and the court is satisfied by competent proof, it may enter an order directing the comptroller or the disbursing officer of any pension fund to deduct regularly from such respondent's salary, compensation or pension sufficient moneys to comply with the order of the court and pay the amount so deducted from such salary or pensions directly into the appropriate part of the family court for the benefit of the petitioner.

§ 133. Writ of seizure.—Where an order in this court for support has been made and the respondent has failed to obey it and has left, or threatens to leave, the jurisdiction of the court and possesses property within that jurisdiction, or where no order has been made but it is set forth in the petition for such support that the petitioner has been deserted by the respondent who has left the city and whose whereabouts are unknown and who possesses property within the jurisdiction, such property, by application to any two justices of the court, may be taken, seized and applied in the manner provided in title eight of part six of the code of criminal procedure.

§ 134. Suspension of sentence; probation.—In the case of a respondent found chargeable with support or guilty of non-support or where the respondent shall have neglected or refused to obey an order for support as provided in sections one hundred and twenty-eight and one hundred and thirty-two the court may suspend sentence or the enforcement of the order, as the case may be, and place him on probation under such conditions as the court may determine, and in accordance with the provisions of the code of criminal procedure. No person, however, shall be placed on probation unless an order to that effect is made by the court.

§ 135. Revocation of probation.—The court may at any time, where circumstances warrant it, revoke the suspension of the sentence or the execution of the warrant, as the case may be, or the probation of a respondent. Upon such revocation the respondent shall be brought to court and shall be dealt with by the court as if there had been no suspension of sentence or warrant and to that end, without a further hearing, the court may make any order that might have been made at the time of such suspension.

§ 136. Bond.—Where the court has suspended sentence upon a respondent it may require him to give an undertaking as provided in article five of this title.

§ 137. Divorces; separations; annulments; et cetera.—1. If the marriage relationship shall have been terminated by final degree of the supreme court of the state of New York or by judgment of any other court of competent jurisdiction, when valid in the state of New York, a petition may be filed or an order for support made or enforced in the family court only for the benefit of a child of such marriage.

2. Where a separation has been granted by the supreme court of the state of New York to either spouse or an action for divorce, separation, annulment or dissolution is pending, and the husband or father shall have been required

under the terms of any order or decree entered in such supreme court action, to pay a specified sum to the spouse or for her child or children as alimony or maintenance and has failed to do so, a proceeding may be instituted in the family court to compel support within the limits of the order or decree of the supreme court and as set forth by section ninety-two of this act, unless the respondent is in jail for failure to obey the order of the supreme court. In the absence of an order of the supreme court in such action providing for support of a child or children up to the age of seventeen years, the family court may entertain a petition for the support of such child or children.

3. In the absence of any order or decree entered in a supreme court action, either before, on or after judgment providing alimony, or where there is an order or decree expressly denying alimony upon it being shown to the satisfaction of the family court that the petitioner therein is likely to become a public charge, an order for her support may be made.

4. After final adjudication by the supreme court denying alimony in a separation action, if in the opinion of the family court the circumstances of the parties have changed, or if it is shown to the satisfaction of the family court that the petitioner is likely to become a public charge, the family court may entertain a petition for support.

5. A separation agreement shall in no way preclude the filing of a petition for the support of a child or the making of an order for its support by the family court, or for the support of a wife who is likely to become a public charge.

§ 136. The city as a party.—The city may in any case where a person is likely to become a public charge, file the petition in an action for support. The corporation counsel shall assign to each part of the family court a representative, who, unless the petitioner is represented by counsel, may represent the petitioner. The corporation counsel in his discretion, may also represent such petitioner in any appel-

late court to which such petitioner may appeal. The absence of the corporation counsel's representative from any hearing, however, shall not be deemed to invalidate or impair the proceedings.

§ 139. Bonds for support; bail for appearance; forfeiture; payment.—If a bond for support be required of the respondent or if he be admitted to bail for appearance at court, the condition of the undertaking shall be for his future compliance with the court's order for support, or his appearance according to the terms thereof, or in default thereof that the surety will pay to the clerk of the court a specified sum as therein set forth. Instead of entering into such an undertaking a respondent may deposit money in an amount to be fixed by the court. If the respondent fails to appear in accordance with the terms of the undertaking, the court shall enter the fact of such non-appearance upon the record, and the undertaking for his appearance, or the money deposited in lieu thereof, shall be forfeited and upon order of the court the sum recovered shall be applied by the clerk of the court, in such weekly or monthly installments or in such other manner as the court shall direct for the benefit of the petitioner. The court may, however, in its discretion remit such forfeiture. It shall be the duty of the wardens of the various prisons under the jurisdiction of the department of correction of the city to receive, when tendered in cash, the sums fixed by the court as bonds for support and bail for appearance, and thereupon to release the respondent from custody, and to remit forthwith all such sums received, directly to the clerk of the court in which the action is pending.

§ 140. Procedure when court is not in session.—If a respondent is arrested at a time when the family court is not in session, he shall be taken to the most accessible magistrate and arraigned before him. The production of the warrant shall be evidence of the filing of a proper information, and the magistrate shall thereupon hold the respond-

ent, admit to, fix or accept bail, or parole him for trial before the family court. All subsequent proceedings shall be had in the family court.

§ 141. Erroneous arraignment before a magistrate.—Whenever a person is brought before a magistrate and, in the opinion of such magistrate, the person should properly be brought to the family court, the magistrate shall thereupon transfer such case to the family court of the appropriate borough and direct that the persons involved be taken thereto.

§ 142. Respondents in jail.—Where a respondent has been committed to jail he shall be visited shortly after such commitment by a probation officer assigned for duty for the purpose of seeing whether he is then likely to obey the orders of the court if released. A report in writing shall be made to the court by the probation officer, through the probation bureau, setting forth the nature of the interview thus had. The time of making the initial visit and subsequent visits to respondents in jail, which shall be made at reasonably frequent intervals, shall be at such time as the rules of the board may prescribe. Written report shall be made of all such interviews. These shall be part of the case history.

§ 143. Acceptance of undertaking by magistrates.—Where bail has been fixed or an undertaking for support has been required by a justice of the domestic relations court, if that court is not in session any magistrate to whom application is made shall pass on the sufficiency of the undertaking and may accept such bail or undertaking for support and shall forward it to the domestic relations court.

SUMMONS

SUMMONS—*Parent* (D.W.)

Docket No. 1637/57

STATE OF NEW YORK

DOMESTIC RELATIONS COURT OF THE CITY OF NEW YORK

FAMILY COURT DIVISION

COUNTY OF QUEENS

To Margaret Jeffrey Siebel, address 52-07 Concord Ave., Little Neck, Queens, City of New York:

A PETITION having been filed in this Court by the Commissioner of the Department of Welfare of the City of New York, alleging that you have refused or neglected to provide support for dependent child....., duly committed to an incorporated institution, for whose support you are legally chargeable.

YOU ARE HEREBY SUMMONED to appear before this Court at 105-34 Union Hall Street, Jamaica, N. Y., in the above named County, on December 17th, 1957, at 9:30 o'clock in the forenoon of said day, to be examined as to your ability to maintain such dependent in whole or in part, pursuant to the provisions of law.

On your failure to appear as herein directed a warrant may be issued for your arrest.

[SEAL]

By Order of the Court:

MICHAEL J. KUHN
Administrative Officer.

Prevailing and Dissenting Opinions of the Court of Appeals of the State of New York

Dept. of Welfare of City of N. Y. v. *Siebel*
Cite as 190 N. Y. S. 2d 683

6 N. Y. 2d 536

Department of Welfare of City of New York, Appellant, v. *Margaret J. Siebel, Respondent.*

COURT OF APPEALS OF NEW YORK.

July 8, 1959.

The Department of Welfare of the City of New York brought proceeding against stepmother of child, who had been committed to school for delinquents, to compel stepmother to contribute a certain monthly sum for the support of the child because sum contributed by the father was insufficient to reimburse the City of New York in full. The Domestic Relations Court of the City of New York, George Postel, J., entered an order directing the stepmother to pay $20 a month for support of the child, and the stepmother appealed. The Supreme Court, Appellate Division, Second Department, 5 A. D. 2d 1010, 174 N. Y. S. 2d 430, on April 28, 1958 entered an order reversing the order of the Domestic Relations Court and dismissing the petition, and the Department of Welfare of the City of New York appealed. The Court of Appeals, Conway, C. J., held that a father is "incapable of supporting his child" within meaning of provision of a Domestic Relations Court Act that where father of child is "incapable of supporting his child," mother of child is chargeable with support of child where possessed of sufficient means or able to earn such means, if father is unable to pay full amount needed to support the child, and that stepmother, who married the child's father with knowledge of the existence of the child, could be compelled to contribute to the support of the child where amount paid

by the father for support of the child was insufficient to reimburse the City of New York in full.

Order of Appellate Division reversed, and order of Domestic Relations Court reinstated.

Fuld, Van Voorhis and Burke, JJ., dissented.

1. Parent and Child 14

A stepmother is a "stepparent" within meaning of provision of the Domestic Relations Court Act that the "stepparent" of the child is legally chargeable with support of stepchild likely to become a public charge, if stepparent had knowledge of child's existence at time of stepparent's marriage. Domestic Relations Court Act, 101.

See publication Words and Phrases, for other judicial constructions and definitions of "Stepparent".

2. Statutes 181(1)

Legislative intent is to be determined primarily from language used in statute.

3. Statutes 188

Court of Appeals is not at liberty to restrict by conjecture, or under guise or pretext of interpretation, meaning of word used in statute.

4. Parent and Child 3.1(3)

A father is "incapable of supporting his child" within meaning of provision of a Domestic Relations Court Act that where father of child is "incapable of supporting his child," mother of child is chargeable with support of child, where possessed of sufficient means or able to earn such means, if father is unable to pay full amount needed to support the child. Domestic Relations Court Act, 101.

See publication Words and Phrases, for other judicial constructions and definitions of "Incapable of Supporting His Child".

5. Parent and Child 14

Where father was unable to pay full amount for support of delinquent son, who had been committed to school for delinquents, the son's stepmother, who had married the father with knowledge of the existence of a son, could be compelled to contribute to the support of the son. Domestic Relations Court Act, §§ 56-a, 92, 101, 121 et seq.

6. Parent and Child 3.3(3)

Word "or" in provision of Domestic Relations Court Act that if Department of Welfare is of opinion that parent or legal custodian of child committed to public or private institution is able to contribute in whole or in part Commissioner of Welfare shall institute proceedings in the Family Court to compel such parent "or" other person legally chargeable to contribute such portion of such expense on account of maintenance of child as shall be proper and just and that such court is vested with jurisdiction may be read as "and" to carry out legislative intent. McKinney's Consol. Laws, Statutes, § 365; Domestic Relations Court Act, § 56-a.

See publication Words and Phrases, for other judicial constructions and definitions of "Or".

7. Constitutional Law 299
Parent and Child 14

Article of Domestic Relations Court Act of the City of New York, pursuant to which proceeding was instituted by Department of Welfare of the City of New York against stepmother of child, who had been committed to a school for delinquents, in Domestic Relations Court of the City of New York to compel stepmother to pay a monthly sum for support of child because amount paid by father was insufficient to reimburse city in full for support of child, was not unconstitutional on ground that the proceeding deprived the stepmother of her property without due process. Domestic Relations Court Act, § 121 et seq.

Charles H. Tenney, Corp. Counsel, New York City (Edward A. Doberman and Seymour B. Quel, New York City, of counsel), for appellant.

Robert V. Rafter, New York City, for respondent.

CONWAY, Chief Judge.

This case presents the question whether a stepmother may be compelled to contribute to the expense incurred by the City of New York because of the maintenance of her stepson, who is a public charge having been committed to a school for delinquents, it appearing (a) that the stepmother had knowledge of the child's existence at the time of her marriage to the child's father and (b) that the father had been ordered to contribute to the child's support but the amount so ordered to be paid was insufficient to reimburse the city in full.

The essential facts are undisputed. The respondent and her husband, Joseph Siebel, were married on August 7, 1953. The boy, also named Joseph Siebel, was born on March 27, 1943, so that he was 10 years and 4 months old at the time of the marriage. On or about November 1, 1957 (the boy was then 14 years and 8 months old), the boy was adjudicated delinquent by the Children's Court Division of the Domestic Relations Court, Queens County, and committed to the care and custody of Cedar Knolls School, Hawthorne, New York, at a cost of $49 a week to the City of New York.

The present proceeding was instituted by petition of the appellant Department of Welfare of the City of New York dated December 3, 1957. The prayer for relief was that "in accordance with the provisions of Chapter 482, Laws of 1933, as amended by Chapter 671, Laws of 1940, (Section 56-a), process of this Court be issued requiring the said Margaret Jeffrey Siebel to appear before this Court to be examined as to her ability to contribute in whole or in part toward the support of said child--while in the care

and custody of said association, agency, society or institution [Cedar Knolls School] * * *."

After the filing of the petition a summons was issued by an administrative officer of the court, directing the respondent to appear before the court to be examined as to her ability to support her nearly 15-year-old stepchild. On January 7, 1958 the respondent was examined by the court and an order was that day entered requiring the respondent to pay the sum of $20 *per month* toward the support of the stepchild, retroactive to November 1, 1957.

The father of the child was also required to pay $22.50 *per week* for the child's support, commencing January 1, 1958. On appeal by the respondent, the Appellate Division reversed, two Justices dissenting.

On this appeal the Department of Welfare argues that (1) the order of support was authorized by the applicable statutes, which when read together, evince a legislative intent that contribution towards the expense incurred by the City of New York in maintaining a child in an institution may be compelled simultaneously from more than one person legally chargeable for the child's support, including a stepmother, at least where the father is unable to pay the full cost, (2) even if relatives are liable for support in a particular order of succession obtaining less than full contribution from a father, said to be primarily liable, does not exhaust power to proceed against a stepmother, even if only secondarily liable, for the whole or part of the balance, and (3) there is no merit to contentions that under the statutes prior recourse must be had to grandparents before resorting to stepparents, or that "step parent" does not include "step mother", or that the Domestic Relations Court Act does not afford procedural due process.

The respondent, on her part, contends that (a) section 56-a should be strictly construed and that here a stepmother's liability is precluded since the parent has been held liable under a support order; (b) article 4 of title III

of the Domestic Relations Court Act is unconstitutional; (c) the statute does not contemplate charging a stepmother with support of a stepchild; (d) the liability of a stepparent is quarternary (fourth in line); and (e) none of the allegations contained in the petition has been proven.

Section 56-a of the Domestic Relations Court Act of the City of New York, pursuant to which this proceeding was instituted, reads in pertinent part:

"Duties of city department of welfare and city department of health with respect to compelling support.

"1. Upon the remand or commitment of a child to a public or private institution other than a shelter maintained and conducted by a society for the prevention of cruelty to children, the department of welfare of the city of New York shall investigate the ability of the *parent of the child, or other person legally chargeable*, to contribute in whole or in part to the expense incurred by the city of New York on account of the maintenance of such child.

"2. If in the opinion of the department of welfare such parent or legal custodian is able to contribute in whole or in part the commissioner of welfare shall thereupon institute a proceeding in the family court of the domestic relations court of the city of New York to compel such *parent or other person legally chargeable* to contribute such portion of such expense on account of the maintenance of such child as shall be proper and just and the domestic relations court of the city of New York is vested with jurisdiction in the premises.

"3. * * *." (Emphasis added.)

Section 92 of the Domestic Relations Court Act of the City of New York, entitled "Powers", provides, in part that:

"In the exercise of its jurisdiction the court shall have power * * *

"(5) To order support of a stepchild *by the persons legally chargeable* therewith up to the age of seventeen years, subject to the limitations of subdivision five of section one hundred and one. * * *" (Emphasis added.)

It will be observed that section 56-a provides merely that the Department of Welfare may institute a proceeding to compel support from the child's parent "or other person legally chargeable" with the child's support and that section 92 provides merely that the court has jurisdiction "[t]o order support to a stepchild by the persons legally chargeable therewith * * *." Nowhere do either of those sections enumerate the persons who are "legally chargeable" with the support of a stepchild. For that, one must look to section 101 of the Act. That section reads:

"§ 101. Legal liability for support.

"1. A husband is hereby declared to be chargeable with the support of his wife and children and, if possessed of sufficient means or able to earn such means, may be required to pay for their support a fair and reasonable sum according to his means, as may be determined by the court. * * *

"2. Where the father of a child is dead or is incapable of supporting his child or cannot be found within the state, the mother of such child is hereby declared to be chargeable with its support and if possessed of sufficient means or able to earn such means, may be required to pay for its support a fair and reasonable sum according to her means, as may be determined by the court.

"3. Where the father of a child included in a petition for support is dead, or where the court, in its judgment, is unable to secure adequate support for such child from its parents, and the child's grandparents are of sufficient means to support it, said grandparents are hereby declared to be chargeable with the support of such grandchild and may be required to pay a fair and reasonable sum according to their means, as may be determined by the court.

"4. • • •

"5. The step parent of a child is hereby declared legally chargeable with the support of a step child likely to become a public charge provided it is shown to the satisfaction of the court that such step parent had knowledge of the child's existence at the time of said step parent's marriage.

"6. • • •".

The foregoing statutes may be summarized as follows:

(1) The father is primarily and unconditionally liable for the support of his child;

(2) The mother is liable, but conditionally, the conditions being (a) that the father of the child is dead, or (b) is incapable of supporting his child, or (c) is out of the State;

(3) The grandparents are liable, but conditionally, the conditions being (a) that the father is dead, or (b) that the court is unable to secure adequate support for the child from its parents.

In the case of each of the above persons, the liability for support is enforcible if the person is possessed of sufficient means.

(4) A stepparent is legally chargeable with the support of a stepchild, but conditionally, the conditions being (a) that the child is likely to become a public charge *and* (b) that the stepparent have had a knowledge of the child's existence at the time of said stepparent's marriage.

The first of the two conditions precedent to a stepparent's liability for support exists here, viz., that the child is "likely to become a public charge." The child here is in a home for delinquents and is being supported by the City of New York. What is more, the respondent does not contend that the first condition does not obtain. The second condition, viz., that the stepparent have had knowledge of the child's existence at the time of said stepparent's mar-

riage also exists here (respondent herself so testified). The two conditions being present, respondent makes the argument that the term "step parent" means "step father" and that even if "step parent" is read to include a "step mother" she is not liable for support here since a step-parent's liability is fourth in line and does not come into being at all until there is proof of the inability of the blood relatives (i. e., the mother and the grandparents of the child) to pay.

In support of her argument that "step parent" means "step father" the respondent relies upon dictum in the case of Glowsky v. Gitlin, 16 Misc. 2d 768, 771, 25 N. Y. S. 2d 957, 959, the thrust of which was: "The term stepparent as used in the statute can only mean 'stepfather.' To include a stepmother within the statutory term of a step-parent, in a law requiring and enforcing the obligation of support of a stepchild, is without the necessary foundation of moral law."

[1-3] Quite apart from the fact that this a dictum of a lower court, and as such is not binding on this court, the statement is unsound. It can hardly be argued that every statute must find its foundation or basis in moral law. Many statutes have no relationship to moral principles. For example, many acts have been made crimes by legislative enactment not because the acts transgress moral law but simply because the Legislature in its wisdom has chosen to classify them as such. These are the crimes described as "mala prohibita" and "are crimes only because they are prohibited by statute." 22 C. J. S. Criminal Law § 8. So, too, the Legislature is free—if it is so disposed—to burden a stepmother with the support of her stepchild, without having to find some justification in moral law for its action. The question which remains is: "Has the Legislature done so?" In my judgment that question can only be answered in the affirmative. Legislative intent is to be determined primarily from the language used in the act under consideration. Here the word chosen by the Legisla-

ture was "step parent", not "step father", although the latter word was certainly available. We are not at liberty to restrict by conjecture, or under the guise or pretext of interpretation, the meaning of the phrase selected.

This brings us to that which may be described as the main issue in the case, viz., whether contribution may be compelled simultaneously from more than one person legally chargeable for the child's support including a stepmother, at least where the father is unable to pay the full balance.

As stated above, according to section 101 of the Domestic Relations Court Act of the City of New York, a father is primarily and unconditionally *liable* for the support of his children; a mother is liable, but only (1) where the father of the child is dead, *or* (2) is incapable of supporting his child, *or* (3) is out of the State; and grandparents are liable, but only (1) where the father is dead, or (2) where the court is unable to secure adequate support for the child from its parents. Finally, a stepparent is legally chargeable with the support of a stepchild (1) if the child is likely to become a public charge and (2) the stepparent had knowledge of the child's existence at the time of said stepparent's marriage.

[4, 5] We have already pointed out that the two conditions precedent to a stepparent's liability exist here and that respondent does not argue to the contrary. Doubtless, a reading of section 101 discloses a legislative intention to make the father of a child the one who has the primary duty of its support. However, if the father is incapable of supporting his child—and we think it reasonable to conclude that a father is incapable of supporting his child within the meaning of the statute if he is unable to pay the full amount needed to support the child—the liability of other persons comes into existence. There is nothing in section 101 to suggest that so long as the father can afford as little as one dollar towards the support of his child that no one else is obligated to contribute thereto and we should not read such a meaning into the statute for we

would produce an anomalous result if we were to do so. The evident object of the statute is to assure the child of support. The father has been made primarily liable for such support. If he fails, the liability of the mother, the grandparents and the stepparent arises. The statute does not enumerate the order in which these other persons become liable *inter se* and a fair reading of the statute is that they have all been made "secondarily liable." The majority and dissenting Justices in the Appellate Division all agreed that the father of a child is primarily responsible and that the other persons legally chargeable are secondarily liable. Their difference was on the question of whether support can be required of one of those secondarily liable where an order of support has been entered against the father but such order is insufficient to provide the necessary support for the child. The majority, relying on the wording of section 56-a, held that as between the parent and the respondent, who is in the position of one secondarily liable, the liability is in the alternative. The dissenting Justices, on the other hand, said that: "* * * In our opinion, section 56-a of the Domestic Relations Court Act must be read with subdivision (5) of section 92 of the same statute, which provides that the court may order support to such a stepchild by *the persons* legally chargeable therewith, subject to the limitations of subdivision 5 of section 101. The purpose of section 56-a appears to be to permit the Department of Welfare of the City of New York to compel those legally responsible for the support of a child committed for institutional care, to contribute to the expense incurred by the city in the maintenance of such a child according to their financial ability. * * * Although appellant may be only secondarily liable, she is nevertheless chargeable with the child's support, to the extent which may be proper and just, in a proceeding such as this in which the father, primarily liable, is unable to contribute the full amount of the expense incurred and has been required to contribute such part thereof as has been determined to be just and proper in accordance with his ability. [Cases cited.]" [5 A. D. 2d 1010, 174 N. Y. S. 2d 432.]

We agree with the view taken by the dissenting Justices. Section 56-a provides for proceedings by the local Department of Welfare to compel contribution toward the city's expenses in such cases, and vests jurisdiction of such proceedings in the Domestic Relations Court of the City of New York. Contribution is exacted from the parent "or other person legally chargeable" if it is found after investigation that ability to contribute in whole or in part exists.

[6] The word "or" in the phrase quoted may be read as "and" to carry out the legislative intent (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 365). Section 56-a is procedural in nature. It relates to the remedy rather than to the right. Its very title refers to the duties of the Department of Welfare—that is, the procedures to be followed—with respect to compelling support. It grants a more expeditious remedy to the Department of Welfare in addition to the remedy by civil action available under section 104 of the Social Welfare Law.

It would seem to follow that in considering whether the respondent is liable for support, and, therefore, contribution, under the circumstances of this case, we should consider primarily the scope and language of section 101 of the statute which gives rise to the Department of Welfare's cause of action. In this view section 56-a, relating to the remedy or the means by which the cause is enforced, is of secondary importance.

[7] Respondent argues that article 4 of title III of the Domestic Relations Court Act of the City of New York, pursuant to which this proceeding was instituted, is unconstitutional. The respondent contends that the proceeding deprives her of property without due process. She asserts that the statute does not afford one an opportunity to interpose an answer to the department's petition; that the allegations of the petition are assumed to be valid in every respect and, if they are not true, there is nothing the respondent can do about it; that the city has made, not

merely a prima facie case, but a conclusive case, and the sole issue becomes one of determining how much the respondent can afford to pay and that the respondent's only remedy is an appeal.

This argument is without substance. No answer or formal pleading by respondent was necessary; the allegations of the petition were to be established or disproved by evidence (Vendetti *v.* Vendetti, 16 Misc. 2d 2, 31 N. Y. S. 2d 487). The respondent was represented by counsel, and had the right to cross-examine and to present evidence. That she chose to rest upon a legal argument which the court below did not accept certainly did not deprive her of a fair hearing.

At page 15 of her brief the respondent states that the "Petition herein, *verified* December 3, 1957, filed December 5, 1957, alleges that the respondent: 'refused or neglected to provide support for dependent child * * * for whose support you are legally chargeable.' The record contains no evidence of refusal or neglect to provide support."

An examination of the petition will disclose that the petition does not allege that the respondent "refused or neglected" to support the child. It alleges merely that she "failed * * * to do so". The contention that there was no proof of express refusal accordingly is moot. It may not be denied that prior to this proceeding the respondent had failed to provide any amount of support. Certainly that failure—and indeed even a refusal to support—may reasonably be inferred from her resistance to the making of an order in this proceeding.

Reference is made by respondent to the fact that the respondent and her husband are on the verge of a divorce. That fact has no bearing on the validity of the support order here under review.

The order of the Appellate Division should be reversed and that of the Domestic Relations Court reinstated, without costs.

FULD, Judge (dissenting).

I would affirm the determination of the Appellate Division.

The issue here presented is whether the respondent stepmother may be called upon to contribute to the expense of maintaining her husband's child, who had been adjudicated a delinquent, in an institution. Pursuant to section 56-a of the Domestic Relations Court Act of the City of New York, the child's father had been required to pay $22.50 a week for that purpose, and the New York City Department of Welfare thereafter instituted the present proceeding to require the respondent also to contribute. The Domestic Relations Court directed her to pay $20 a month "for the support of" the child, the Appellate Division reversed and dismissed the petition.

The petitioner takes the position that, because a number of statutes require a stepparent—after parents and grandparents—to be responsible for the support of a child who is likely to become a public charge, a stepparent may be compelled, under section 56-a, to contribute to the maintenance of a child in an institution to the extent that the child's own parent's contribution is inadequate. I find nothing in the statute which mandates any such result.

Section 56-a of the Domestic Relations Court Act provides that, upon the remand or commitment of a child to a public or private institution, the Department of Welfare shall investigate "the ability of the parent of the child, *or* other person legally chargeable, to contribute in whole or in part to the expense incurred by the city of New York on account of the maintenance of such child" and, if in its opinion, "such parent *or* legal custodian is able to contribute in whole or in part", the Commissioner of Welfare shall institute a proceeding "to compel such parent *or* other person legally chargeable to contribute such portion of such expense on account of the maintenance of such child as shall be proper and just" (italics supplied). The step-

parent is among those declared "legally chargeable" with the stepchild's support if the former knew of the child's existence at the time of his marriage (N. Y. City Dom. Rel. Ct. Act, § 101, subd. 5).

When the Legislature called upon a "parent" or "other person legally chargeable" to contribute to the child's support in an institution, its design, quite obviously, was to require the father (if there was one) to pay in the first instance and, if he did, that was the measure of the contribution to be made to the city "on account of [its] maintenance of such child". The statute negates the idea that, if the full amount necessary for maintaining the child in an institution was not paid by the father, the balance, or some further sum, could be required of the stepmother. In other words, where the father is found to be "able to contribute in whole or in part" to the expense incurred by the city and he pays the amount "assessed" against him, the statute does not authorize the collection of any further amounts from the stepmother.

The language and design of the legislation establish that there was no disposition on the part of the Legislature to require contributions, once the father or other custodian primarily responsible has contributed, from the stepmother or the other persons listed in section 101 as legally chargeable. If the father's contribution proves inadequate, the legislative scheme requires that the deficit be borne by the city, for the statute negates the existence of multiple liability to be visited in part on the father and in part on the stepmother. As demonstrated by use of the word "or" in section 56-a, the liability imposed is in the alternative, not in the conjunctive. Absent a clear indication of a legislative design, the courts may not change the word "or" to "and" (McKinney's Cons. Laws of N. Y., Book 1, Statutes, § 365). In short, it was the legislative design that a parent, and only the parent, pay for or contribute to the support of his child in an institution; if he made no contribution, the next person "legally chargeable" could be required to contribute, first the grandparents, and, then, the stepparents.

On the other hand, if the Legislature had meant a stepmother, as well as the child's own father, to contribute, section 56-a would have so provided, as does subdivision 4 of section 101 of the Domestic Relations Court Act in a similar situation. That subdivision recites that the "parents, the grandparents and the children of a dependent person over seventeen years of age * * * who * * * is likely to become a public charge are hereby *declared to be severally chargeable* with the support of such poor relative. The court shall determine and apportion the fair and reasonable sum that each such person shall be required to contribute". (Italics supplied.) The absence of any such provision in the case of a child committed to an institution is more than persuasive that the liability of a stepparent is only alternative to that of a parent and, hence, where the father pays for some part of the child's maintenance, no responsibility rests upon the stepmother—or other legally chargeable person—to make a further contribution to the child's support.

DESMOND, DYE and FROESSEL, JJ., concur with CONWAY, C. J.

FULD, J., dissents in an opinion in which VAN VOORHIS and BURKE, JJ., concur.

Order reversed, etc.

Prevailing and Dissenting Opinions of the Appellate Division

(5 App. Div. 2d 1010)

DEPARTMENT OF WELFARE OF THE CITY OF NEW YORK, Respondent, v. MARGARET J. SIEBEL, Appellant.—In a proceeding under section 56-a of the Domestic Relations Court Act of the City of New York, it appears that a child has been heretofore committed by the Domestic Relations Court of the City of New York, Family Court Division, Queens County, to the care and custody of a school at an expense of $49 a week to the respondent, Department of Welfare of the City of New York. It further appears that the child's father has earnings and that an order has been heretofore made by the Family Court Division directing him to pay $22.50 a week for the child's support. The appeal is from an order directing appellant to pay in addition $20 a month for the support of her husband's child. Order reversed on the law, without costs, and petition dismissed. Implied findings of fact are affirmed. Under section 56-a, the child's parent "or other person legally chargeable" with the child's support may be compelled "to contribute in whole or in part to the expense incurred by the city of New York on account of the maintenance of such child." Here, an order having been made directing the father to pay, there is no power to make a further order directing the stepmother to pay. As between the parent and the appellant, who is in the position of such "other person legally chargeable", the liability is in the alternative. The parent is primarily responsible and the "other person" is secondarily liable. The disjunctive word "or" in subdivisions 1 and 2 of section 56-a, may not be read as "and". (McKinney's Cons. Laws of N. Y., Book 1, Statutes, 365.) Murphy, Ughetta and Hallinan, JJ., concur; Nolan, P. J., and Kleinfeld, J., dissent and vote to affirm, with the following memorandum: The child, whose support is the subject of this proceeding, is 15 years of age.

In our opinion, section 56-a of the Domestic Relations Court Act must be read with subdivision (5) of section 92 of the same statute, which provides that the court may order support to such a stepchild by *the persons* legally chargeable therewith, subject to the limitations of subdivision 5 of section 101. The purpose of section 56-a appears to be to permit the Department of Welfare of the City of New York to compel those legally responsible for the support of a child committed for institutional care, to contribute to the expense incurred by the city in the maintenance of such a child according to their financial ability. Appellant had knowledge of the child's existence at the time of her marriage to the child's father. (See N. Y. City Dom. Rel. Ct. Act, § 101, subd. 5.) Although appellant may be only secondarily liable, she is nevertheless chargeable with the child's support, to the extent which may be proper and just, in a proceeding such as this in which the father, primarily liable, is unable to contribute the full amount of the expense incurred and has been required to contribute such part thereof as has been determined to be just and proper in accordance with his ability. (See Social Welfare Law, § 101, subd. 1; N. Y. City Dom. Rel. Ct. Act, § 101, subd. 2; cf. *Matter of Wignall* v. *Wignall*, 163 Misc. 910; *Hagopian* v. *Samuelson*, 236 App. Div. 491, 492.)